No. 16-1150

IN THE

Supreme Court of the United States

ELSA HALL,
As Personal Representative of the Estate of Ethlyn Louise Hall and as Successor Trustee of the Ethlyn Louise Hall Family Trust,
Petitioner,

v.

SAMUEL H. HALL, JR. AND HALL & GRIFFITH, P.C.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a party may appeal as of right from a judgment that resolves some but not all claims in a case consolidated for all purposes pursuant to Federal Rule of Civil Procedure 42(a).

RULE 29.6 DISCLOSURE STATEMENT

Hall & Griffith, P.C., has no parent corporation, and no publicly held company owns 10% or more of the company's stock.

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15A Charles Alan Wright et al., Federal Practice & Procedure § 3914.7 (2d ed. 2017 update) 18

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BRIEF FOR RESPONDENTS

INTRODUCTION

The final judgment rule ordinarily restricts parties to a single appeal as of right at the conclusion of a case. For decades, the Court has held that this rule does not permit litigants to appeal a decision that resolves some but not all claims pending before the district court. Such a decision does not "end[] the litigation on the merits." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). And requiring appellate courts to review each claim piecemeal, rather than in a single combined appeal, would inevitably waste

judicial resources, deprive district courts of control over their dockets, and impose unnecessary costs on the litigants themselves.

These principles apply with equal force whether multiple claims are brought in a single action or, as here, in separate actions that are subsequently consolidated "for all purposes." In every pertinent respect, the two circumstances are identical: Claims are decided pursuant to joint proceedings, involve common issues of law or fact, and constitute a single "judicial unit." Treating a fully consolidated case differently than a multiple-claim action would generate perverse incentives, encouraging litigants to split their claims so as to secure a right of immediate appeal. And allowing immediate appeal from a judgment resolving some but not all claims in a fully consolidated case would undercut the policies the final judgment rule seeks to promote: efficiency for appellate courts, docket control for district courts, and fairness to litigants.

Accordingly, the courts of appeals are virtually unanimous in holding that parties may file an appeal as of right in a fully consolidated case only when the district court resolves all claims and "disassociates itself from [the] case." *Swint* v. *Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995). This rule does not preclude litigants from filing immediate appeals where appropriate. Rather, parties may invoke one of the safety valves Congress and this Court specifically designed to authorize discretionary appeals where efficiency and equity so warrant, including certification pursuant to Federal Rule of Civil Proce-

dure 54(b), interlocutory appeal under 28 U.S.C. § 1292, or the writ of mandamus.

Petitioner, however, did not invoke any of these established routes to review. After the District Court entered judgment on some, but not all, of several closely related claims in a case consolidated for all purposes, petitioner immediately sought an appeal as of right from the partial judgment. The Third Circuit dismissed that appeal for lack of jurisdiction, instructing petitioner that the proper course was to seek a discretionary appeal under Rule 54(b). That judgment properly prevented petitioner and other similarly situated litigants from short-circuiting the appeals process and upsetting the balance struck by the final judgment rule. The judgment should be affirmed.

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

Pertinent statutory provisions and Federal Rules of Civil Procedure are reproduced in an addendum to this brief. Add. 1a-6a.

STATEMENT

A. Legal Background

1. The Federal Rules reflect a "liberalization" of joinder practice designed "to allow more issues and parties to be joined in one action." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Numerous provisions of the Federal Rules accordingly permit parties and courts to present and resolve related claims in a single case. They permit a plaintiff to file "as many claims as it has against an opposing party," Fed. R. Civ. P. 18(a); permit (and

sometimes require) defendants to file counterclaims, crossclaims, and third-party claims, Fed. R. Civ. P. 13, 14, 18; and allow interested third parties to join a suit and press potentially relevant claims of their own, Fed. R. Civ. P. 19, 20, 22.

Rule 42(a) offers one means by which courts can decide related claims together. It provides that "[i]f actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." Fed. R. Civ. P. 42(a).

Rule 42(a) has long been understood to permit two forms of consolidation. *See Gelboim* v. *Bank of Am. Corp.*, 135 S. Ct. 897, 904-905 n.4 (2015). First, courts may "partially consolidate" related claims by holding joint proceedings for some but not all matters at issue. *E.g.*, *Am. Nat'l Bank & Tr. Co. of Chicago* v. *Equitable Life Assurance Soc'y of U.S.*, 406 F.3d 867, 876 (7th Cir. 2005). In these circumstances, each case retains a separate docket. The consolidation may extend only to certain proceedings—say, discovery but not trial. *See id.* And the cases may become decoupled and once again continue on wholly separate tracks once the consolidated proceedings conclude. *See, e.g.*, *Burton* v. *Am. Cyanamid*, Nos. 07-cv-0303 et al., 2016 WL 3661331, at *1 (E.D. Wis. July 5, 2016); *Anticancer, Inc.* v. *Cambridge Research & Instrumentation, Inc.*, Nos. 07CV97 JLS (RBB) & 07CV1004 JLS (AJB), 2007 WL 9627562, at *2 (S.D. Cal. Nov. 2, 2007).

Second, courts may consolidate claims "for all purposes." *Gelboim*, 135 S. Ct. at 904 n.4. All-purpose consolidation works to unify cases in almost every respect. *See, e.g.*, *Ringwald* v. *Harris*, 675 F.2d 768, 771 (5th Cir. 1982); *Florida Wildlife Fed'n, Inc.* v. *Adm'r, U.S. E.P.A.*, 737 F.3d 689, 693 (11th Cir. 2013) (per curiam). The actions are typically placed on a single docket.[1] They undergo every stage of the proceedings together, from discovery through jury selection, trial, and verdict. *See, e.g.*, 15B Charles Alan Wright et al., Federal Practice & Procedure § 3914.20 (2d ed. 2017 update). And they continue to travel together until the district court resolves every claim at issue. *Id.* Because all-purpose consolidation is so comprehensive, courts typically order it only where the actions present common issues of law or fact that are "central to the resolution of the cases." *E.g.*, *Johnson* v. *Doyle*, No. 4:07CV1843 AGF, 2010 WL 1692212, at *1 (E.D. Mo. Apr. 27, 2010); *CSX Transp., Inc.* v. *Alban Waste, LLC*, Nos. JKB-13-1770 & JKB-14-137, 2014 WL 1340041 (D. Md. Apr. 2, 2014).

2. Federal law contains a carefully designed set of rules governing the time at which a party may appeal judgment in cases involving multiple claims. Section 1291 supplies the default rule. It provides,

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[1] *See, e.g.*, *Crest Audio, Inc.* v. *QSC Audio Prods., Inc.*, Nos. 3:12-cv-755-CWR-FKB & 3:13-cv-610-CWR-FKB, 2016 WL 3249217, at *3 (S.D. Miss. Mar. 4, 2016); *Reckitt Benckiser LLC* v. *Amneal Pharm. LLC*, Nos. 15-2155(RMB/JS) & 15-4524(RMB/JS), 2016 WL 208295, at *2 (D.N.J. Jan. 15, 2016); Pet. App A-15.

as relevant, that parties may appeal "*final* decisions of the district courts of the United States * * * and the District Court of the Virgin Islands." 28 U.S.C. § 1291 (emphasis added). A decision is "final" for purposes of this provision only if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Riley* v. *Kennedy*, 553 U.S. 406, 419 (2008) (quoting *Catlin*, 324 U.S. at 233). Accordingly, a litigant cannot appeal until the "district court disassociates itself from [the] case" as a whole, even if judgment has been rendered on some of the claims at issue. *Swint*, 514 U.S. at 42.

Rule 54(b), however, offers a discretionary means of obtaining immediate review of a decision resolving some but not all claims in a case. The Rule reiterates that parties may obtain an appeal *as of right* only when a court enters "judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). But it provides that "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." *Id.* In this way, the Rule makes the district court a "dispatcher" in multiple-claims cases, giving it discretion to decide whether to permit an earlier appeal than the final judgment rule normally allows. *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956).

Federal law also provides two other avenues for parties to obtain immediate appeal of adverse judgments in a multiple-claim action. Section 1292(b) authorizes an interlocutory appeal where a non-final order "involves a controlling question of law as to

which there is substantial ground for difference of opinion" and from which "an immediate appeal * * * may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). And the writ of mandamus enables a party to petition a court of appeals to promptly reverse "a judicial usurpation of power or a clear abuse of discretion." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 111 (2009) (quoting *Cheney* v. *U.S. Dist. Court for D.C.*, 542 U.S. 367, 390 (2004)).

B. Factual And Procedural Background

1. Samuel Hall and Elsa Hall are siblings. For many years, Samuel served as caretaker to Ethlyn Hall, the siblings' mother, at her home in the Virgin Islands. J.A. 110 ¶ 15. During that time, Samuel provided free legal assistance to Ethlyn, managed Ethlyn's property, and performed grocery shopping and other chores on her behalf. Pet. App. A-3; J.A. 120-121 ¶ 79. As Ethlyn began to exhibit signs of diminished mental capacity, Samuel took an increasingly active role in Ethlyn's care. J.A. 128 ¶ 120.

In 2010, Elsa—who up to that point played a minimal role in caring for her mother—visited Ethlyn in the Virgin Islands and, without informing Samuel, relocated her to Miami, Florida. J.A. 109 ¶ 6; J.A. 121-122 ¶¶ 80, 84-85, 87. The following year, a complaint was filed purportedly on Ethlyn's behalf against Samuel and his law firm, Hall & Griffith, P.C. J.A. 1-2. This lawsuit, docketed as civil action number 11-54, alleged that Samuel had breached his fiduciary duty to Ethlyn and committed conversion, malpractice, and fraud. J.A. 27-42. The complaint's central allegation was that Samuel and his law firm

had managed one of Ethlyn's Virgin Islands properties for Samuel's own benefit, rather than in the interests of Ethlyn. *Id.*

While this lawsuit was still in its preliminary stages, Ethlyn died, and Elsa became trustee of Ethlyn's estate. J.A. 18. Elsa amended the complaint and continued pressing the suit in a representative capacity. J.A. 2, 18-19.

In their answer to Elsa's complaint, Samuel and his law firm denied Elsa's allegations and filed a counterclaim against Elsa in both her individual and representative capacities. J.A. 61-107; *see* Pet. App. A-4 to A-5 n.4. Samuel alleged that it was Elsa who had breached her fiduciary duty to Ethlyn, by taking advantage of Ethlyn's diminished mental capacity to persuade Ethlyn to appoint Elsa as trustee. J.A. 94-96. Furthermore, Samuel alleged that Elsa had committed intentional infliction of emotional distress, conversion, fraud, and other intentional torts by alienating Ethlyn from Samuel and misappropriating Ethlyn's property for Elsa's own benefit. J.A. 96-102. Samuel's claims, like Elsa's, revolved in part around Ethlyn's intentions regarding her property in the Virgin Islands; among other things, Samuel alleged that Elsa had misappropriated funds that Ethlyn had allocated for construction of the property. J.A. 93, 102.

Because Elsa was a plaintiff solely in her representative capacity, Samuel subsequently determined that his counterclaims were more appropriately brought in a separate complaint. Samuel therefore filed a new complaint, in a case docketed as civil action number 13-95, re-raising his claims against

Elsa in her individual capacity. J.A. 108. The substance of this complaint was materially identical to the counterclaim; it alleged the same intentional torts and turned on substantially the same allegations. J.A. 142-151. Accordingly, Samuel moved to consolidate the claims with the 11-54 action. J.A. 3. The District Court granted the motion, consolidating the cases for all purposes and directing that "[a]ll submissions in the consolidated case" be docketed in the 11-54 action. Pet. App. A-15. All subsequent proceedings were thus held jointly: The court resolved motions on a single docket, issued a joint trial management order, and held a single jury trial on all claims. J.A. 4; Pet. App. A-4, A-8.

2. The jury returned a single verdict finding for Samuel on all counts. J.A. 163-172. It rejected Elsa's claims that Samuel had committed breach of fiduciary duty, conversion, and fraud. J.A. 163-167. And it found that Elsa had intentionally inflicted emotional distress on Samuel, awarding him substantial compensatory and punitive damages as a result. J.A. 168, 172.

Elsa moved for a new trial as to Samuel's claims against her. J.A. 7. While that motion was pending, Elsa filed a notice of appeal as to the judgment rejecting her claims against Samuel. J.A. 7-8. Before the Court of Appeals had considered that appeal, the District Court granted the motion for a new trial. J.A. 10, 13; Pet. App. A-5 to A-6. Samuel's claims "remain outstanding" in the District Court, and the District Court has not yet issued final judgment on them. Pet. App. A-7; Cert. Reply 1.

3. The Third Circuit dismissed Elsa's appeal for lack of jurisdiction in a unanimous, non-precedential opinion. Pet. App. A-3. The court explained that "[w]hen two cases have been consolidated for all purposes, a final decision on one set of claims is generally not appealable while the second set remains pending." Pet. App. A-7. Here, "Samuel's claims against Elsa were consolidated for all purposes with the Estate's claims against him," and "were in fact scheduled together and tried before a single jury." Pet. App. A-4, A-8. Furthermore, "the trial record illustrate[d] some overlap of evidence among the claims": For instance, "[w]itnesses such as Samuel and Elsa would inevitably testify in a suit involving either set of claims, and both sets of claims may turn on" Ethlyn's state of mind, including "how [she] reacted to learning about" Samuel's management of her property and "who or what was influencing her thinking at the time." Pet. App. A-8. Because of these significant commonalities, "[t]here are also likely [to] be overlapping issues on appeal once Samuel's claims become appealable." Pet. App. A-9. Recognizing that "the District Court decided that justice and judicial economy were best served by consolidation in the first place," the Third Circuit concluded that it would "not second guess that judgment * * * by allowing piecemeal appeals." *Id.*

The Court of Appeals noted, however, that its holding did not preclude Elsa from seeking immediate appeal. Elsa "could have sought Rule 54(b) certification"; indeed, her counsel "conceded that nothing prevented him from seeking a Rule 54(b) motion even as the appeal was pending before" the Third Circuit. Pet. App. A-9 n.11. Yet Elsa's counsel

"chose not to do so." *Id.* Because Elsa had not availed herself of "that mechanism to certify appeals when finality is either lacking or in doubt," the court lacked jurisdiction to consider her appeal. *Id.*

SUMMARY OF ARGUMENT

In a case consolidated for all purposes pursuant to Rule 42(a), a party may not file an appeal as of right from a judgment that resolves some but not all pending claims. Petitioner's appeal was accordingly premature, and the Third Circuit correctly concluded that it lacked jurisdiction.

I. A. Under 28 U.S.C. § 1291, litigants may file an appeal as of right only when a district court issues a "final decision" in a case. It is well-established that, in a multiple-claim action, an order resolving some but not all claims is not a "final decision" subject to immediate appeal. Rather, an appeal as of right is permitted only when a court disposes of all claims in the "judicial unit" as a whole. *Mackey*, 351 U.S. at 432. This Court has held that this rule applies even when the various claims were initially filed as part of different actions and later joined together. *See Cold Metal Process Co.* v. *United Eng'g & Foundry Co.*, 351 U.S. 445, 451 (1956).

B. That principle resolves this case. A case consolidated for all purposes is in every pertinent respect identical to a case involving multiple claims: In each circumstance, the claims are adjudicated together from start to finish, revolve around the same "common questions of law or fact," and "meld" into a "single unit." *Gelboim*, 135 S. Ct. at 905. If claims filed by different parties under different dockets constitute a "single judicial unit" for purposes of the

final judgment rule, as this Court has held, then there is no reason a different result should obtain for cases consolidated for all purposes. That conclusion accords with this Court's decision in *Gelboim*, which recognized the difference between consolidation solely for pre-trial purposes and consolidation for all purposes. And it prevents litigants from evading the longstanding limits on appeals as of right simply by splitting their claims across multiple lawsuits.

C. This conclusion is reinforced by the fact that a judgment resolving only some claims in a fully consolidated case lacks the hallmarks of a final judgment. Such a decision does not end the litigation on the merits. Nor does it furnish the party's last opportunity for an appeal, given that the court still must issue an order resolving the remaining claims. And such a judgment is likely to be closely intertwined with the merits of the claims that remain to be decided. This Court has never deemed a judgment final that is so patently inconclusive.

D. Furthermore, allowing an appeal as of right each time a court issues partial judgment in a fully consolidated case would contravene the purposes of the final judgment rule. It would encourage piecemeal appeals and sap appellate resources; deprive district courts of control over their dockets; and subject parties to the cost and harassment of a succession of separate appeals.

II. Although litigants lack an appeal as of right from partial judgment in a fully consolidated case, federal law provides three "safety valve[s]" that enable discretionary appeals where appropriate. *Mohawk*, 558 U.S. at 111. Rule 54(b) permits district

courts to authorize immediate appeal from a partial judgment that is *independent* of the merits of the claims that remain. Fed. R. Civ. P. 54(b). Section 1292(b) authorizes interlocutory appeal from a judgment that is *important* to resolution of the case as a whole. And the writ of mandamus enables review of clear and manifest *errors*. These discretionary avenues of review enable immediate appeal where efficiency and fairness warrant it. And they place control over the timing of appeals in the hands of the tribunal most familiar with the case: the district court.

Petitioner, by contrast, is unable to identify any workable system for mitigating the harms imposed by her proposed rule, which would require an appeal from *every* partial judgment in a case consolidated for all purposes. Petitioner suggests that the courts of appeals should enter a stay whenever the claim being appealed is sufficiently related to the issues that remain unresolved in the district court. But that system would put control over the timing of appeal in the hands of the tribunal *least* familiar with the case, and would not be governed by any discernible legal standards. The fact that the law provides no workable system for excepting claims from petitioner's rule is a telling indication that that rule lacks a valid legal basis.

III. Petitioner's appeal is therefore premature. The district court consolidated Samuel's claims and Elsa's claims for all purposes. But petitioner appealed before the district court had entered final judgment on Samuel's claims, and petitioner never sought certification under Rule 54(b). The Third

Circuit correctly concluded that it lacked jurisdiction over petitioner's appeal. This Court should affirm.

ARGUMENT

I. LITIGANTS MAY NOT APPEAL AS OF RIGHT FROM A JUDGMENT THAT RESOLVES SOME BUT NOT ALL CLAIMS IN A CASE CONSOLIDATED FOR ALL PURPOSES.

Virtually every court of appeals bars litigants from filing an appeal as of right in a fully consolidated case until the district court has resolved each of the claims before it.[2] This consensus flows directly from

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[2] *See Glob. NAPs, Inc.* v. *Verizon New England, Inc.*, 396 F.3d 16, 22 (1st Cir. 2005); *Houbigant, Inc.* v. *IMG Fragrance Brands, LLC*, 627 F.3d 497, 498-499 (2d Cir. 2010) (per curiam); *Bergman* v. *City of Atl. City*, 860 F.2d 560, 566-567 (3d Cir. 1988); *Watson* v. *Adams*, 642 F. App'x 240, 241 (4th Cir. 2016) (per curiam); *Ringwald*, 675 F.2d at 771; *Alinsky* v. *United States*, 415 F.3d 639, 642 (7th Cir. 2005); *Tri-State Hotels, Inc.* v. *FDIC*, 79 F.3d 707, 711 (8th Cir. 1996); *Huene* v. *United States*, 743 F.2d 703, 705 (9th Cir. 1984); *Trinity Broad. Corp.* v. *Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (per curiam); *Schippers* v. *United States*, 715 F.3d 879, 884 (11th Cir. 2013); *U.S. ex rel. Hampton* v. *Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C. Cir. 2003); *Spraytex, Inc.* v. *DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996). The only arguable exception to this consensus is the Sixth Circuit, and it has issued inconsistent rulings on the question. *Compare Advey* v. *Celotex Corp.*, 962 F.2d 1177, 1181 (6th Cir. 1992), *with Beil* v. *Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994). Contrary to petitioner's characterization, *see* Br. 15, the First Circuit has held that the "disposition of one case in a consolidated action is a final and appealable judgment *unless the cases were consolidated for all purposes.*" *Glob. NAPs*, 396

the decades-old principle that litigants lack an appeal as of right until a district court has resolved each claim in a suit; in every pertinent respect, a fully consolidated case is indistinguishable from any other suit in which multiple claims are joined for adjudication. Moreover, a partial judgment in a fully consolidated case lacks the fundamental hallmarks of finality. And entitling parties to immediately appeal such judgments would subvert the aims of the final judgment rule and generate substantial inefficiencies and inequities that that rule is designed to prevent. There is no basis for upsetting the established practice of the judicial system in favor of petitioner's proposed regime of mandatory piecemeal appeals—one that no circuit employs, that no precedent supports, and that would predictably upset the operation of innumerable appeals filed in the federal courts day in and day out.[3]

A. Litigants Are Generally Entitled To A Single Appeal From Final Judgment In Cases Involving Multiple Claims.

1. " 'From the very foundation of our judicial system,' the general rule has been that 'the whole case and every matter in controversy in it [must be] decided in a single appeal.' " *Microsoft Corp.* v. *Baker*,

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F.3d at 22 (emphasis added) (internal quotation marks omitted).

[3] This case does not concern the timing of appeal in a *partially* consolidated case. *See supra* pp. 4-5 (distinguishing partial consolidation and consolidation for all purposes). As this Court recognized in *Gelboim*, that question may present substantially different issues. *See Gelboim*, 135 S. Ct. at 904-905 n.4.

137 S. Ct. 1702, 1712 (2017) (quoting *McLish* v. *Roff*, 141 U.S. 661, 665-666 (1891)) (brackets in original). This venerable principle is embodied in 28 U.S.C. § 1291, which provides as relevant that "[t]he courts of appeals *** shall have jurisdiction of appeals from all final decisions of the district courts of the United States *** and the District Court of the Virgin Islands."

The final judgment rule "promotes the efficient administration of justice." *Microsoft*, 137 S. Ct. at 1712; *see also Dig. Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). By restricting parties to a single appeal as of right, it "prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of *** a single controversy." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). It preserves "the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk*, 558 U.S. at 106 (quoting *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981)). And it protects parties from "the harassment and cost" that would inevitably arise if unsuccessful litigants could subject their opponents to "a succession of separate appeals." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940).

In light of these important objectives, the Court "'has long given' § 1291 a 'practical rather than a technical construction.'" *Mohawk*, 558 U.S. at 106 (quoting *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). As a general matter, a decision is "final" within the meaning of section 1291 only if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judg-

ment." *Riley*, 553 U.S. at 419 (quoting *Catlin*, 324 U.S. at 233). The Court has explained that such a decision bears several important hallmarks of finality: It is a decision "by which a district court disassociates itself from a case," *Swint*, 514 U.S. at 42; it furnishes a party's last effective opportunity for appeal, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); and it leaves undecided only those ancillary questions—regarding attorney's fees and other similar matters—whose resolution would not assist appellate review of the merits, *Ray Haluch Gravel Co.* v. *Cent. Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 134 S. Ct. 773, 779-780 (2014).

The Court has also recognized "a 'small class' of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.'" *Mohawk*, 558 U.S. at 106 (quoting *Cohen*, 337 U.S. at 545-546). These decisions exhibit the same essential characteristics of finality as judgments ending the litigation on the merits: They too are "conclusive," "effectively unreviewable on [subsequent] appeal," and "separate from the merits" of the issues that remain. *Id.* (quoting *Swint*, 514 U.S. at 42). There is only a "modest" set of decisions, however, that satisfy these demanding criteria, *Will* v. *Hallock*, 546 U.S. 345, 350 (2006), and are so important as to "overcome the usual benefits of deferring appeal until litigation concludes," *Mohawk*, 558 U.S. at 107.

Apart from these collateral orders, section 1291 does not permit appeal from decisions—"even from fully consummated decisions"—that do not conclude the litigation on the merits. *Cohen*, 337 U.S. at 546.

Such decisions may be of great importance to the parties; they may deny claims, reject defenses, dismiss parties from the suit, and more. But they are "but steps towards final judgment in which they will merge." *Id.* Delaying appeal of such orders does not cause any party to irrevocably "los[e]" her rights. *Id.* Moreover, those decisions may yet "affect, or * * * be affected by, decision of the merits of th[e] case." *Id.* Congress struck the balance in section 1291 that decisions of this nature can "be reviewed and corrected" only "if and when final judgment results." *Id.*

2. It is well-settled that orders resolving some but not all claims in a case are not final judgments appealable as of right under section 1291. As the Court explained in *Mackey*, section 1291 provides "no authority for treating anything less than the whole case as a judicial unit for purposes of appeal." 351 U.S. at 432. And a decision as to only some claims "obviously [i]s not a final decision of the whole case." *Id.* at 431-432. Numerous cases have reaffirmed this basic principle. *See, e.g.*, *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 276 n.7 (1988) ("separate reviews of the component elements in a unified cause" are not permitted); *Coopers & Lybrand*, 437 U.S. at 467 n.8 (same); *Firestone*, 449 U.S. at 374 (explaining that the "rule" is that "a party must ordinarily raise all claims of error in a single appeal"); *see also* 15A Charles Alan Wright et al., Federal Practice & Procedure § 3914.7 (2d ed. 2017 update).

Rule 54(b) reflects this settled understanding. It states that "[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim,

crossclaim, or third-party claim—or when multiple parties are involved," an order that "adjudicates fewer than all the claims * * * *does not* end the action as to any of the claims." Fed. R. Civ. P. 54(b) (emphasis added). Rather, such an order "may be revised at any time before the entry of a judgment adjudicating *all* the claims and *all* the parties' rights and liabilities." *Id.* (emphases added).

Rule 54(b) also establishes a discretionary exception to this rule. It states that if a district court "determines that there is no just reason for delay," it may "direct entry of a final judgment as to one or more, but fewer than all, claims or parties." *Id.* This language gives the district court *discretion* to certify an appeal as to some claims in a multiple-claim case. *Mackey*, 351 U.S. at 435. But it does not afford litigants an appeal *as of right* prior to entry of final judgment on all claims. *See Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 691 (2010) (Ginsburg, J., dissenting) (identifying this language as an "exception[] to the 'final-decision' rule").

Accordingly, this Court has long recognized that parties may appeal a judgment that resolves some but not all claims in a case only if they obtain certification under Rule 54(b). In *Mackey*, for instance, the Court held that a plaintiff needed to obtain Rule 54(b) certification to appeal a judgment "striking out Counts I and II" of her complaint "without disturbing Counts III and IV." 351 U.S. at 430, 438. For "good reason," the Court explained, "[t]he timing of such a release is * * * vested by the rule primarily in the discretion of the District Court as the one most likely

to be familiar with the case and with any justifiable reasons for delay." *Id.* at 437.

In *Cold Metal Process Co.*—a companion case decided the same day as *Mackey*—the Court held that this same rule applied where multiple claims were filed as different actions and later joined together. In that case, the defendant had filed a "counterclaim * * * long after the principal proceeding [had] begun," as part of "another action" with "a separate case number." 351 U.S. at 446, 448-449. But the Court nonetheless found that the claims needed to be appealed together: Both were "within the jurisdiction of the District Court" as part of a single broad proceeding, and so together they constituted a "single judicial unit" for purposes of appeal. *Id.* at 449, 451. Absent Rule 54(b) certification, the court of appeals "would have been without jurisdiction until [the] counterclaim also had been decided by the District Court." *Id.* at 451.

3. Three Terms ago, in *Gelboim*, the Court clarified that the final judgment rule does not bar appeal as of right from a judgment dismissing some but not all claims in an action consolidated solely "for pretrial proceedings in multidistrict litigation" (MDL). 135 S. Ct. at 901. This limited consolidation, the Court concluded, did not render the claim a single "judicial unit" for purposes of appeal. *Id.* at 905.

The Court pointed to several features of an MDL that support this conclusion. The Court explained that the MDL statute expressly refers to the claims as separate "actions," not as a single case. *Id.* at 904. Furthermore, actions joined in an MDL are only temporarily part of the same consolidated proceeding,

and will ultimately be "remanded to the[ir] originating district[s]" for decision on the merits; they accordingly cannot be said to "meld *** into a single unit." *Id.* at 905. And, critically, a transferee court is not required to render *any* judgment at the conclusion of the MDL proceeding, making it impossible to identify any single "final decision" from which a litigant may appeal. *Id.* at 905.

The Court repeatedly emphasized, however, that its conclusion does not mean that claims consolidated for *all purposes* are separately appealable as of right. It explicitly stated that it "express[ed] no opinion on whether an order deciding one of multiple cases combined in an *all-purpose* consolidation qualifies under § 1291 as a final decision appealable as of right"—and indeed quoted the Seventh Circuit's holding that such cases "become a single judicial unit" once consolidated. *Id.* at 904 n.4 (emphasis added) (quoting *Brown* v. *United States*, 976 F.2d 1104, 1107 (7th Cir. 1992)). Moreover, the Court stated that it "need not decide whether or how Rule 54(b) applies to cases consolidated for all purposes involving closely related issues," which, it noted, often "could have been brought under the umbrella of one complaint." *Id.* at 906 n.7.

B. A Case Consolidated For All Purposes Should Be Treated No Differently Than Other Cases Involving Multiple Claims.

A case consolidated for all purposes is indistinguishable from any other case involving multiple claims for relief: It involves a single set of procedures, implicates a "common question of law or fact," and comprises a single judicial unit. This Court has

repeatedly held that actions involving multiple claims—even where filed as part of different actions and by different parties—are appealable only upon final judgment. There is no basis for treating fully consolidated cases any differently, particularly as doing so would allow easy evasion of the limits on appeals as of right in multiple-claim actions.

1. In every way, cases consolidated for all purposes are "meld[ed] * * * into a single unit" that is indistinguishable from any other case involving multiple claims for relief. *Gelboim*, 135 S. Ct. at 905.

First, fully consolidated actions are *procedurally* unitary. They are placed on a single docket. They are subject to a single set of proceedings, from discovery to jury selection to trial. And they remain together until their conclusion, and are never decoupled or "remanded to the[ir] originating" courts. *Id.*; *see supra* p. 5.

Second, fully consolidated actions are *substantively* a single unit. To order any form of consolidation, a court must find that the various claims present "a common question of law or fact." Fed. R. Civ. P. 42(a). And to order all-purpose consolidation, courts typically require that the common issue be "central to the resolution of the cases." *Johnson*, 2010 WL 1692212, at *1 (internal quotation marks omitted); *see supra* p. 5. These standards closely resemble the criteria provided by other Rules for joining related claims in a single case. *See, e.g.*, Fed. R. Civ. P. 13, 19, 23. Indeed, a core function of consolidation is to permit courts to combine actions that "*could* have been brought under the umbrella of one" case, whether as multiple counts of a single complaint, or

as counterclaims, crossclaims, or third-party claims. *Gelboim*, 135 S. Ct. at 906 n.7 (emphasis added). The commonality between claims consolidated for all purposes will thus be no less than—and often substantially greater than—claims filed as part of the same case pursuant to the Rules' "liberal joinder" provisions. *Mackey*, 351 U.S. at 432.

Third, the text of Rule 42(a) indicates that fully consolidated actions *formally* become a single case. Rule 42(a) provides that where two actions raise "a common question of law or fact," courts may "consolidate the actions." Fed. R. Civ. P. 42(a)(2). At the time of the Rule's enactment, as now, the term "consolidate" meant to "unite into one system or whole." American Heritage Dictionary of the English Language (5th ed. rev. 2017); *see* Oxford English Dictionary (2d ed. 1989) (similar); Black's Law Dictionary (10th ed. 2014) ("[t]o combine or unify * * * into one mass or body" or, in civil procedure specifically, "[t]o combine, through court order, two or more actions involving the same parties or issues into a single action"). The plain meaning of the phrase "consolidate the actions" is thus to "unite" two or more actions into "one * * * whole"—that is, to join them into a single case.

This reading is supported by context. Rule 42(a)(1) grants courts authority to "join for hearing or trial any *or all* matters at issue in the actions." Fed. R. Civ. P. 42(a)(1) (emphasis added). If all-purpose "consolidation" pursuant to Rule 42(a)(2) merely entailed joining multiple actions for procedural purposes, it would be wholly duplicative of Rule 42(a)(1). Rule 42(a)(2) therefore must permit courts

to do something more: not just to hold joint hearings or trial, but to "consolidate" the actions *themselves* into a single unit. What is more, other provisions of federal law—including the MDL provision at issue in *Gelboim*—authorize courts to hold "consolidated * * * *proceedings*" in multiple cases. 28 U.S.C. § 1407(a) (emphasis added); *see also id.* § 1332(d)(11)(B)(ii)(IV); 15 U.S.C. § 1195(b); *cf.* Fed. R. Civ. P. 65(a)(2). Had the drafters wished to permit courts simply to unite the "proceedings" in a case, they would presumably have used similar language in Rule 42(a)(2), rather than authorizing courts to unite the "actions" themselves.

Accordingly, it is difficult to conceive of any meaningful respect—procedural, substantive, or formal—in which a case consolidated for all purposes differs from a case in which the relevant claims were filed together or joined pursuant to one of the Rules' "liberal joinder" provisions. *Mackey*, 351 U.S. at 432. Particularly given this Court's repeated admonition that the final judgment rule must be given "a practical rather than a technical construction," *Mohawk*, 558 U.S. at 106 (internal quotation marks omitted), the functional as well as formal identity between fully consolidated cases and multiple-claim actions dictates that they both should be treated the same way: as a single "judicial unit" appealable only when all claims are decided. *Mackey*, 351 U.S. at 432.

2. This Court's precedents strongly reinforce this conclusion. In *Cold Metal Process Co.*, the Court addressed a case that was substantially similar to a consolidated case: It involved a claim and a counterclaim that had been filed as separate "action[s]," by

different parties, fifteen years apart. 351 U.S. at 446-449. Each action bore "a separate case number" and sought different relief. *Id.* at 446, 449. Nonetheless, because the actions were "within the jurisdiction of" the same court, and the second action was deemed "ancillary" to the original proceeding, the Court held that they constituted a "single judicial unit" that could be appealed only pursuant to a Rule 54(b) certification. *Id.* at 449, 451-453. The Court emphasized, moreover, that this conclusion would hold "even if the counterclaim did not arise out of the same transaction and occurrence as [the principal] claim." *Id.* at 451.

A case consolidated for all purposes pursuant to Rule 42(a) is at least as unitary as the actions at issue in *Cold Metal Process Co.* Unlike in *Cold Metal Process Co.*, fully consolidated actions are typically placed on a single docket and treated as one for all purposes. Moreover, they *must* involve "common question[s] of law or fact." Fed. R. Civ. P. 42(a). If the loose consolidation at issue in *Cold Metal Process Co.* was a single "judicial unit," then *a fortiori* an all-purpose consolidation under Rule 42(a) must be, too.

Gelboim also supports this conclusion. Every characteristic that the Court found indicative of the claims' separateness in *Gelboim* is absent in the case of all-purpose consolidation. Unlike the MDL statute, Rule 42(a) does not refer to fully consolidated claims as separate "actions" subject to "consolidated * * * proceedings," *Gelboim*, 135 S. Ct. at 904-905, but instead authorizes the actions *themselves* to be "consolidate[d]." Fed. R. Civ. P. 42(a)(2). A court at no point "remand[s]" the components of a consolidat-

ed case to a separate court, but rather adjudicates them together until their completion. *Gelboim*, 135 S. Ct. at 905. And a consolidated proceeding, unlike an MDL, must end with a clear judgment resolving all remaining claims, thereby furnishing parties a clear opportunity for appeal. *Id.* at 906.

Petitioner claims (at 18) that *Johnson* v. *Manhattan Ry. Co.*, 289 U.S. 479 (1933), undermines this conclusion. It does not. *Johnson* merely held, several years before the Federal Rules' enactment, that where a district court consolidated two cases at the end of litigation solely for purposes of entering a joint order in both actions, the two cases did not merge into a "single cause" for purposes of issue preclusion. *See id.* at 494, 496-497. That holding is irrelevant three times over. It concerned a partially consolidated case, not a case consolidated for all purposes. It held only that the claims did not become a "single cause" for purposes of preclusion, not that they did not become a "single judicial unit" for purposes of the final judgment rule—a wholly unrelated question. *Id.* at 496-497. And the Court was construing a different statute, one from which the drafters of Rule 42 deliberately departed: Unlike the predecessor statute it replaced, Rule 42 differentiates between the authority to grant partial consolidations and the authority to grant consolidations for all purposes. *Compare* 28 U.S.C. § 734 (1934), *with* Fed. R. Civ. P. 42(a)(1)-(2); *see* Fed. R. Civ. P. 42 advisory committee's note to 1937 adoption (explaining that Rule

42(a) was "based upon" 28 U.S.C. § 734, "but in so far as the statute differs from this rule, it is modified").[4]

3. It is particularly important to treat fully consolidated cases as a single judicial unit for purposes of appeal because a contrary rule would enable parties to evade the careful system the Federal Rules impose for determining the timing of appeal in multiple-claim cases.

As noted above, Rule 54(b) sets out a specific procedure that parties must follow to obtain immediate appeal in a case "present[ing] more than one claim for relief." Fed. R. Civ. P. 54(b). It states that a party ordinarily may not appeal a "decision * * * that adjudicates fewer than all the claims" in a given case. *Id.* Final judgment is entered only when the court "adjudicat[es] all the claims and all the parties' rights and liabilities." *Id.* But the Rule provides a safety valve: If the district court wishes to authorize an earlier appeal, it "may direct entry of a final judgment as to one or more, but fewer than all,

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[4] The other three cases on which petitioner relies (at 18) are even less relevant. All three were decided before Rule 42 went into effect. Furthermore, in *United States* v. *River Rouge Improvement Co.*, 269 U.S. 411 (1926), the Court authorized an appeal because the particular decision at issue satisfied the collateral order doctrine, not because of any rule generally applicable to consolidated cases. *Id.* at 413-414. In *Mutual Life Insurance Co. of New York* v. *Hillmon*, 145 U.S. 285 (1892), the Court considered a limited-purpose consolidation "for trial," not an all-purpose consolidation. *Id.* at 286. And *Withenbury* v. *United States*, 72 U.S. 819 (1866), was an admiralty case governed by an entirely different body of procedural law from ordinary civil actions. *See id.* at 820-821 (relying on a rule applicable to "a prize cause").

claims or parties only if the court expressly determines that there is no just reason for delay." *Id.*

The drafters designed this rule to vest the district court—rather than the litigants—with discretion to decide when immediate appeal is appropriate in multiple-claim cases. The drafters recognized that, in light of the "wide scope" of cases under the Federal Rules, parties might face "possible injustice" if required "to await adjudication of the entire case" before appealing "a distinctly separate claim." Fed. R. Civ. P. 54(b) advisory committee's note to 1946 amendment. But they also wished to "preserve[] the historic federal policy against piecemeal appeals." *Mackey*, 351 U.S. at 438. Accordingly, they chose to make the district court "a 'dispatcher,'" permitting it—as the tribunal "most likely to be familiar with the case and with any justifiable reasons for delay"—to determine "the appropriate time when each 'final decision' upon 'one or more but less than all' of the claims in a multiple claims action is ready for appeal." *Id.* at 435, 437.

Permitting litigants to immediately appeal a partial judgment in cases consolidated for all purposes would enable them to circumvent this system with ease. Rather than filing their separate claims, counterclaims, and crossclaims as part of a single combined action, litigants could simply file each claim in a separate suit. By doing so, they could obtain an immediate appeal as to every dismissed claim, without first needing to ask the district court to grant a Rule 54(b) certification. And district courts would be powerless to prevent this evasion, because even all-purpose consolidation would not be

sufficient to unite the claims into a single judicial unit.

That concern is more than hypothetical. As petitioner attests (at 15), litigants typically dislike waiting until entry of final judgment to appeal adverse decisions. And parties often seek to split claims in order to obtain tactical litigation advantages. Indeed, even unsophisticated litigants sometimes file a bevy of claims separately and then seek to appeal them one-by-one. *See, e.g.*, *Ivanov-McPhee* v. *Wash. Nat'l Ins. Co.*, 719 F.2d 927, 927 (7th Cir. 1983) (consolidation of ten separate lawsuits by *pro se* plaintiff alleging employment discrimination); *Evans* v. *Groom*, No. 7:17-CV-4-BO, 2017 WL 2779645, at *2 (E.D.N.C. June 26, 2017) (consolidating two separate actions "aris[ing] out of the precise same event or series of events"). Nor would joinder rules and claim-splitting doctrines be sufficient to prohibit these pleading maneuvers: The Federal Rules require joinder only for a handful of mandatory counterclaims and crossclaims, *see* Fed. R. Civ. P. 13, and prohibitions on claim-splitting are restricted to claims that would be subject to issue preclusion if brought separately, *see* 18 Charles Alan Wright et al., Federal Practice & Procedure § 4406 (3d ed. 2017 update).

Last Term, in *Microsoft Corp.* v. *Baker*, the Court construed section 1291 to foreclose a similar means of "subvert[ing] the balanced solution" the Federal Rules established for appealing a particular class of orders. 137 S. Ct. at 1707. In that instance, the rule at issue was Rule 23(f), which gives courts of appeals "discretion" to grant "'permissive interlocutory

appeal' from adverse class-certification orders." *Id.* at 1709. A putative class of plaintiffs sought to avoid this rule by voluntarily dismissing their claims and purporting to file an appeal as of right as soon as certification was denied. *Id.* at 1712-13. The Court held that section 1291 barred this "device." *Id.* at 1712. It was "[o]f prime significance," the Court explained, that permitting this tactic would "undercut[] Rule 23(f)'s discretionary regime," and subvert the "measured, practical solutio[n]" the drafters had devised. *Id.* at 1714 (internal quotation marks omitted). Because the final judgment rule "is not a technical concept," but a "means [geared to] achieving a healthy legal system," the Court held that litigants could not undermine the Rules' "careful calibration" so easily. *Id.* at 1714-15 (quoting *Cobbledick*, 309 U.S. at 326).

The same principle applies here. If litigants could secure an immediate appeal in a multiple-claim case simply by filing their claims separately, they could (and surely would) sidestep the "measured, practical solutio[n]" Rule 54(b) devises for granting immediate appeals where justice so requires. That result would be particularly unacceptable given that the drafters made abundantly clear that certification was to be the "only" means of obtaining immediate appeal in a multiple-claim case, Fed. R. Civ. P. 54(b), and that they did not wish to "overturn the settled federal rule" prohibiting "piecemeal disposal of litigation," Fed. R. Civ. P. 54 advisory committee's note to 1946 amendment.

C. A Judgment Resolving Some But Not All Claims In A Case Consolidated For All Purposes Lacks The Hallmarks Of A Final Judgment.

Partial judgment in a case consolidated for all purposes also lacks the hallmarks of a "final decision" within the meaning of section 1291. This Court has consistently identified three basic features that all final judgments exhibit. Such decisions, the Court has held, must "disassociate[] [the court] from [the] case," *Swint*, 514 U.S. at 42, furnish a party's last effective opportunity for appeal, *Coopers & Lybrand*, 437 U.S. at 468, and leave undecided only questions that are "completely separate from the merits," *id.* The Court has insisted that "final decisions" exhibit these characteristics both in the ordinary course, and when identifying the "small class of orders" that qualify as final under the collateral order doctrine. *Firestone*, 449 U.S. at 374 (internal quotation marks omitted); *see supra* p. 17. A partial judgment in a fully consolidated case possesses none of these elements of finality.

1. An order resolving some but not all claims in a case consolidated for all purposes plainly does not "end[] the litigation on the merits," *Riley*, 553 U.S. at 419 (quoting *Catlin*, 324 U.S. at 233), or "disassociate[] [the court] from [the] case," *Swint*, 514 U.S. at 42. On the contrary, the "litigation" in every sense continues after such an order: The court has yet to resolve all the merits claims on the docket, conclude trial, or put an end to the consolidated proceedings. In the most basic sense, a judgment as to one claim in a consolidated case is not the court's "final deci-

sion[]" on the matters before it. 28 U.S.C. § 1291; *see id.* § 1292(b) (stating that appealable interlocutory orders are ones that "advance the ultimate termination of *the litigation*" (emphasis added)).

2. Nor is a partial order in a case consolidated for all purposes a party's last opportunity for appeal. After issuing such an order, a district court still must resolve the remaining claims in the consolidated action. And when it does so, it must enter a judgment. Fed. R. Civ. P. 58(b). Litigants will therefore have a clear opportunity to file an appeal from that order, in which they can raise claims of error from "all stages of the proceeding." *Cohen*, 337 U.S. at 546.

A partial judgment in a case consolidated for all purposes is thus unlike any order the Court has previously deemed final. With a typical final order, there is simply *no* further opportunity for the litigants to appeal: The district court "disassociates itself from [the] case," leaving no guarantee that it will issue another order from which a party can seek review. *Swint*, 514 U.S. at 42. In *Gelboim*, for instance, the Court placed substantial weight on the fact that a transferee court need not enter any judgment concluding an MDL, meaning that there may be no "event or order" that would trigger a party's right of appeal after the dismissal of its claims. 135 S. Ct. at 905. There is no such concern here; the court cannot resolve the remaining claims in a fully consolidated case without rendering a judgment of some kind. *See* Fed. R. Civ. P. 58(b).

What is more, a partial judgment in a consolidated case does not even satisfy the loosened criteria for an

appealable *collateral* order. The Court has said that an interlocutory judgment may be "final" within the meaning of section 1291 if it is "effectively unreviewable on appeal from a final judgment" because, for instance, the rights at stake would be irrevocably lost if review were delayed. *Coopers & Lybrand*, 437 U.S. at 468; *see Cobbledick*, 309 U.S. at 324-325. There is no argument, however, that an error regarding a run-of-the-mill claim in a consolidated case cannot be adequately rectified on later appeal. Just like any other request for relief, such a claim can be revived through reversal of the district court's order. A claim does not, simply by virtue of being part of a consolidated case, embody a right so important and imperfectly reparable on subsequent appeal as to require immediate review.

3. An order resolving just some claims in a fully consolidated case is also highly unlikely to be "independent of, and unaffected by," the merits of the remaining claims that have yet to be resolved. *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 126 (1945); *see Brown Shoe Co.* v. *United States*, 370 U.S. 294, 308 (1962) (remaining claims must be "independent of, and subordinate to," claims already decided for the decision to be final). Quite the opposite: A decision on a single claim is likely to be "inextricably intertwined" with the merits of the remaining claims. *Cunningham* v. *Hamilton Cty.*, 527 U.S. 198, 205 (1999). As this Court has explained, that is a quintessential characteristic of a non-final judgment. In *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988), for example, the Court held that an order denying a motion to dismiss a case under the doctrine of *forum non conveniens* was non-final

because the resolution of that claim was not "completely separate from the merits" of the remaining claims in the case. *Id.* at 527 (quoting *Coopers & Lybrand*, 437 U.S. at 468). The Court explained that resolving that claim would prejudge the merits of the remaining claims, forcing "repetitive appellate review of substantive questions in the case." *Id.* at 528.

The same is true with respect to an order that resolves some but not all claims in cases consolidated for all purposes. As noted above, consolidated cases must present "common question[s] of law or fact," and in all-purpose consolidations those common questions ordinarily must be "central to the resolution of the cases." *Johnson*, 2010 WL 1692212, at *1 (internal quotation marks omitted); *see supra* p. 5. It is therefore exceedingly likely that the claims will raise "substantially overlap[ping] factual and legal issues" and that an appeal concerning one claim would prejudge the remaining claims that have yet to be considered. *Van Cauwenberghe*, 486 U.S. at 529.

To be sure, courts will sometimes resolve one claim in the consolidated case on grounds that have little or no bearing on the remaining claims. But the Court has repeatedly made clear that, in fashioning rules of appealability under section 1291, it makes categorical judgments, not "case-by-case determinations." *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 439 (1985); *Van Cauwenberghe*, 486 U.S. at 529 ("[W]e look to categories of cases, not to particular injustices."). And it is highly likely that, in the aggregate, partial judgments in fully consolidated

cases will turn on issues that are "enmeshed in the merits" of the claims that have yet to be decided. *Van Cauwenberghe*, 486 U.S. at 528. In the unusual cases in which the claims are independent, or in which it would be efficient to hear an immediate appeal before considering the remaining claims, parties may seek an appeal under Rule 54(b) and section 1292(b). *See infra* Part II.A.

D. Permitting Parties To Appeal Partial Judgments As Of Right Would Undermine The Purposes Of The Final Judgment Rule.

Granting parties an immediate appeal from partial judgment in a fully consolidated case would also thwart the purposes of the final judgment rule. This Court has made clear that the final judgment rule must be construed "in line with the[] reasons for the rule." *Microsoft*, 137 S. Ct. at 1712. And it has often consulted these purposes in determining whether a judgment is final. *See id.*; *Firestone*, 449 U.S. at 374; *Eisen*, 417 U.S. at 170-171. Here, all of the policies underlying the final judgment rule point in the same direction: Enabling immediate appeals as of right would encourage piecemeal appeals, deprive district courts of control over their dockets, and subject parties to the harassment of duplicative and wasteful appeals.

1. Authorizing separate appeals as of right in a fully consolidated case would result in a flurry of "piecemeal, prejudgment appeals" antithetical to "efficient judicial administration." *Mohawk*, 558 U.S. at 106 (quoting *Firestone*, 449 U.S. at 374). Indeed, even petitioner acknowledges as much. Br.

12-13 (acknowledging that "the concern about piecemeal appeals is valid" in some circumstances). And it is not hard to see why.

Where claims involve "a common question of law or fact" that overlaps so substantially that the district court deems consolidation for all purposes appropriate, it is highly likely that separate appeals would present "substantially overlap[ping] factual and legal issues," as well. *Van Cauwenberghe*, 486 U.S. at 529; *see supra* pp. 22-23. For example, multiple appeals might turn on how the law applies to a single transaction common to the claims. Or the appeals may require courts to consider closely related questions regarding the application of the same substantive legal standard. The court of appeals would inevitably be required to examine these common issues "more than once," *Curtiss-Wright Corp.* v. *Gen. Elec. Co.*, 446 U.S. 1, 8 (1980), and incur the resulting "disruption, delay, and expense" of fielding multiple duplicative appeals, *Richardson-Merrell*, 472 U.S. at 430.

Furthermore, the court of appeals would be required to adjudicate these questions without the benefit of the district court's full consideration of the issues presented. Allowing a district court to go first can furnish numerous efficiencies for the court of appeals. If a consolidated case proceeds to final judgment in the district court, the district court may identify some fundamental defect in all of the claims that would obviate the need for the appellate court to consider other issues. Or the district court may develop a factual record that illuminates the issues on review and enables more concrete application of

law to fact. *See* Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be—Part I: Justiciability and Jurisdiction (Original and Appellate)*, 42 UCLA L. Rev. 717, 797 (1995). Better still, the district court may identify a ground for rejecting a party's claims—for example, its inability to prove its claims at trial regardless of the merit of its legal arguments—that will eliminate the need for appellate review altogether.

Permitting immediate appeals as of right from partial judgments would eliminate these efficiencies. It would require appellate courts to decide more appeals, involving more difficult legal questions, on worse records. The final judgment rule reflects a congressional determination that judicial administration is better served by avoiding such a haphazard system. *Cobbledick*, 309 U.S. at 324-325. And the wisdom of that determination is reinforced by this Court's longstanding admonition that courts should not decide difficult questions except where necessary, and even then in the context of as concrete a dispute as possible. *See United Pub. Workers of Am. (C.I.O.)* v. *Mitchell*, 330 U.S. 75, 89 (1947).[5]

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[5] To be sure, there are occasionally circumstances in which efficiency is better served by an immediate appeal—where, for instance, an appeal would resolve an important question of law that could simplify proceedings in the district court. The same possibility exists, however, in every case involving multiple claims. And Congress and this Court chose to account for that possibility not by indiscriminately authorizing appeals as of right, but by developing a regime of discretionary appeals that enables courts to properly separate the wheat from the chaff.

2. Permitting immediate appeals as of right from orders resolving some but not all claims in fully consolidated cases also would "encroach[] upon the prerogatives of district court judges." *Mohawk*, 558 U.S. at 106. When a district judge consolidates cases for all purposes, the judge has determined that the "common question[s] of law or fact" implicated by the cases should be handled together at all phases of the litigation. Fed. R. Civ. P. 42(a). Requiring immediate appeals as of right from partial decisions, however, would undermine the judge's consolidation order. An appeal would decouple the consolidated cases: The district court would no longer have jurisdiction over the claims that were appealed, and the cases would then proceed on different tracks—one track in the district court, and one track (or more) in the court of appeals. That would severely undermine "Congress' judgment that the *district judge* has primary responsibility" to manage the litigation prior to the entry of final judgment on all claims. *Richardson-Merrell*, 472 U.S. at 436; *see* 2016 Year-End Report on the Federal Judiciary 7 (describing benefits of "[a] district judge's skillful exercise of docket administration and case management").

Permitting appeals as of right from partial judgments would also undermine the district court's role as the "dispatcher" who "determine[s] the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright*,

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As discussed below, those mechanisms fully account for the atypical case in which an immediate appeal is desirable. *See infra* Part II.

446 U.S. at 8 (quoting *Mackey*, 351 U.S. at 435). The district court holds that role because of its "intimate knowledge" of the case. *Id.* at 12. But requiring immediate appeals would turn district judges from dispatchers to helpless bystanders. It would force litigants to take appeals that unglue claims from the district judge's consolidation order. That would contravene the district judge's judgment, based on his or her "familiar[ity]," *Mackey*, 351 U.S. at 437, with "all the facets of a case," that the cases should remain together for all purposes, *Curtiss-Wright*, 446 U.S. at 12.

For that reason, requiring immediate appeals undercuts not only the aims of section 1291, but also Rule 42(a)'s regime for managing litigation through consolidation. Permitting appeals as of right from partial judgments in fully consolidated cases would turn Rule 42(a) into a half-measure, running roughshod over the district court's authority to keep cases together for all proceedings from start to finish. The evisceration of Rule 42(a)'s consolidation regime is yet another reason that the final judgment rule cannot permit immediate appeals from orders resolving some but not all claims in a case consolidated for all purposes.

3. Enabling an appeal from an order resolving only some claims in fully consolidated cases also would result in "the harassment and cost of a succession of separate appeals." *Cobbledick*, 309 U.S. at 325. Rather than confronting a single appeal that presents all of the issues simultaneously, parties may be required to litigate separate appeals on different timelines, even for closely related issues. Parties

also may be required to litigate their claims in two fora simultaneously, escalating the cost of litigation.

Permitting separate appeals would also increase the unfairness to the parties whose cases continue in the district court during the "succession of separate appeals." *Id.* The court of appeals may resolve issues in which the parties in the district court have an interest. But the court of appeals would do so in a proceeding in which the parties in the district court have no role. That is a problem, because the court of appeals' judgment likely would have preclusive or even precedential effect on the claims still pending in district court. And it is particularly problematic because the claims to reach the appellate courts first are likely the "weakest" ones, and thus the worst vehicles to test legal issues applicable to a consolidated case as a whole. *Gelboim*, 135 S. Ct. at 906. Such a system would "impose[] a risk of prejudice on the parties whose cases continue at the trial level" but who are not able to participate as parties in the appeal. Steinman, *supra*, at 797.

4. Finally, a regime of intermediate appeals is likely to result in less clarity as to the timing of appeal. "This Court *** has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination." *Richardson-Merrell*, 472 U.S. at 439. "[A]dministrative simplicity is a major virtue in a jurisdictional statute," and "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010).

The rule advanced by respondents achieves that aim by establishing a bright-line rule for cases

consolidated for all purposes: No "final decision" is issued for purposes of section 1291 until the district court has issued a judgment as to all pending claims in the fully consolidated case. That rule provides clear guidance to litigants. And it obviates the need for parties to file protective appeals that unnecessarily burden the dockets of the courts of appeals.

The rule advanced by petitioner, by contrast, does not make clear the deadline for filing an appeal. Once cases have been consolidated for all purposes, it can be difficult to disentangle them from one another. Often, a single docket will become the authoritative repository for filings in the consolidated actions. And the claims from various cases will have been treated together throughout the litigation. Under these circumstances, it may prove difficult—especially in more complex consolidated cases—for litigants to determine exactly when all the claims in their original case have been resolved. In those circumstances, parties may fail to realize before it is too late that the 30-day appeal clock has started to run.

II. THREE DIFFERENT SAFETY VALVES ENABLE PARTIES TO OBTAIN DISCRETIONARY REVIEW OF PARTIAL JUDGMENTS WHERE APPROPRIATE.

Although litigants lack an appeal as of right from partial judgment in a fully consolidated case, they do not lack *any* opportunity for appeal. Three different "safety valve[s]" enable parties to obtain a discretionary appeal where efficiency and equity most warrant it. *Mohawk*, 558 U.S. at 111. These mechanisms confirm that adhering to the established

practice in multiple-claim cases would not work any injustice on litigants. In contrast, the convoluted system petitioner proposes to sand off the rough edges of her rule only confirms that standard's unworkability.

A. Parties May Seek Discretionary Appeal Under Rule 54(b), Section 1292(b), And Mandamus.

Congress and this Court have long recognized that the final judgment rule may sometimes render harsh results in multiple-claim cases. As the Court explained in *Mackey*, the Federal Rules created "increased opportunity for the liberal joinder of claims in multiple claims actions." 351 U.S. at 432. But that in turn necessitated "relaxing the restrictions" upon appealing such claims. *Id.* "Sound judicial administration" dictates that in particularly sprawling actions, "some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on all of the claims." *Id.* Otherwise parties might face "hardship and denial of justice" while "await[ing] the determination" of adjudication of the case as a whole. *Dickinson*, 338 U.S. at 511; *see Gelboim*, 135 S. Ct. at 902.

These concerns apply to fully consolidated actions no less than to other multiple-claim cases. There are some circumstances in which justice or efficiency will be best served by allowing a litigant to file an appeal before a consolidated case as a whole has concluded. A particular claim may be sufficiently *independent* of the remainder of the suit that delay would serve no beneficial purpose, while imposing great costs on the litigant. A claim may also be dismissed on a ground

sufficiently *important* to the litigation as a whole that it would be most efficient to resolve it quickly. And a district court may have *erred* so substantially that it would be appropriate for a court of appeals to swiftly correct the error.

Three existing, well-established legal mechanisms—Rule 54(b), section 1292(b), and the writ of mandamus—respond to all of these concerns. Each one is available to litigants seeking immediate appeal in fully consolidated cases. And together they provide for the principal circumstances in which immediate appeal is efficient and fair.[6]

1. Rule 54(b) was specifically designed to enable appeals from partial judgment in multiple-claim cases. As previously described, this provision permits a district court to authorize immediate appeal of a decision concerning "one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). As the drafters explained, this provision sought to avoid the "possible injustice of a delay in judgment on a *distinctly separate* claim to await adjudication of the entire case." Fed. R. Civ. P. 54 advisory committee's note to 1946 amendment (emphasis added). Its aim is thus to permit immedi-

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[6] Parties concerned about the effects of consolidation on their appeal rights also may seek an immediate appeal of the consolidation order itself, either through section 1292(b) or a writ of mandamus. *See, e.g.*, 2 Motions in Federal Court 8:46 (3d ed. 2017 update); *see also Garber* v. *Randell*, 477 F.2d 711, 715 n.2 (2d Cir. 1973); *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir. 1961).

ate appeal of claims sufficiently *independent* from the merits of the remainder of the case as to justify appeal.[7] *Curtiss-Wright*, 446 U.S. at 8; *Mackey*, 351 U.S. at 436-437.

This Court has made clear that Rule 54(b) certification is available in fully consolidated cases. In *Mackey*, the Court indicated that the relevant "judicial unit" for purposes of section 1291 and Rule 54(b) is the same: As it explained, Rule 54(b) "administers" section 1291's final judgment "requirement in a practical manner in multiple claims actions and does so by rule instead of judicial decision." 351 U.S. at 438. And in *Cold Metal Process Co.*, the Court held that a claim and a counterclaim filed in separate "action[s]" and placed on separate dockets were a "single judicial unit" for purposes of section 1291 and Rule 54(b) alike, and that Rule 54(b) accordingly was available when a court had entered judgment on one but not the other. 351 U.S. at 448, 451. *Gelboim* is to the same effect: It suggested that Rule 54(b) certification may be available in "cases consolidated for all purposes involving closely related issues." 135 S. Ct. at 906 n.7. The import of these cases is clear: Rule 54(b) provides a route to appeal if a matter

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[7] Courts have developed legal standards—which are in turn subject to appellate review—for determining whether such appeals are appropriate. *See, e.g.*, *Braswell Shipyards, Inc.* v. *Beazer East, Inc.*, 2 F.3d 1331, 1335-36 (4th Cir. 1993); *Solomon* v. *Aetna Life Ins. Co.*, 782 F.2d 58, 61 n.2 (6th Cir. 1986); *Allis-Chalmers Corp.* v. *Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3d Cir. 1975), *abrogated on other grounds by Curtiss-Wright*, 446 U.S. 1.

involving multiple claims would constitute a single judicial unit under section 1291.[8]

Indeed, the Federal Rules themselves link Rule 42(a) and Rule 54(b). The advisory committee notes to Rule 42 explicitly direct the reader to "Rule 54(b)" for cases involving "entry of separate judgments." Fed. R. Civ. P. 42 advisory committee's note to 1937 adoption. It is difficult to discern what the drafters could have meant by this cross-reference if not that Rule 54(b) was available at least in some consolidated cases.

Petitioner argues (at 17) that Rule 54(b) cannot authorize immediate appeal in consolidated cases because Rule 54(b) only permits appeals from a single "action," and a fully consolidated case does not become a single "action." This argument merely reiterates petitioner's mistaken contention that consolidated cases must remain for all purposes separate judicial units. The Court has made clear that section 1291 and Rule 54(b) have a common scope. Since consolidated cases become a single unit for purposes of section 1291, *see supra* pp. 22-27,

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[8] The courts of appeals have also almost uniformly recognized that Rule 54(b) certification is available in fully consolidated cases. *Hageman* v. *City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988); *Bergman*, 860 F.2d at 567; *Ringwald*, 675 F.2d at 771; *Sandwiches, Inc.* v. *Wendy's Int'l, Inc.*, 822 F.2d 707, 709-710 (7th Cir. 1987); *McCuen* v. *Am. Cas. Co. of Reading*, 946 F.2d 1401, 1411 (8th Cir. 1991); *Huene*, 743 F.2d at 703; *Trinity Broad. Corp.*, 827 F.2d at 675; *Fla. Wildlife Fed'n, Inc.*, 737 F.3d at 692-693; *U.S. ex rel. Hampton*, 318 F.3d at 216; *Spraytex, Inc.*, 96 F.3d at 1382.

then they naturally do so for purposes of Rule 54(b) as well.

Petitioner suggests (at 17) that understanding consolidated cases as one "action" for purposes of Rule 54(b) would lead to a cascade of undesirable consequences. That is incorrect. For one thing, the fact that a fully consolidated case is a single "action" for purposes of Rule 54(b) does not mean that it must be one "action" for every other conceivable purpose under the Rules. The final judgment rule is given a uniquely "practical *** construction" that need not control in every context. *Mohawk*, 558 U.S. at 106 (internal quotation marks omitted). Indeed, it is clear that Rule 54(b) does *not* use "action" the same way as every other Rule. It provides that a court "end[s] the action" when it "adjudicat[es] all the claims and all the parties' rights and liabilities," Fed. R. Civ. P. 54(b), even though an action may continue for other purposes, such as to adjudicate attorney's fees. *See Ray Haluch Gravel*, 134 S. Ct. at 779-780.

Furthermore, the supposed horribles petitioner describes (at 20) are either unobjectionable or unrelated to respondents' reading. Treating fully consolidated cases as a single action for purposes of other Federal Rules would yield efficiencies consistent with the purposes of consolidation: It would, for instance, reduce the number of pleadings in a consolidated case, *see* Fed. R. Civ. P. 12, and streamline discovery by reducing the number of requests propounded, *see* Fed. R. Civ. P. 30-36. The notion that this reading would have jurisdictional consequences is simply incorrect; each claim in a multiple-claim action must be considered independently for jurisdictional pur-

poses regardless. *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) (citing *Allen* v. *Wright*, 468 U.S. 737, 752 (1984)). Likewise, service of process almost invariably precedes a consolidation order, and so would be unaffected by the scope or import of such an order. The practical consequences for settlement and voluntary dismissal would also be minimal—nothing would stop parties to a particular claim from reaching a contractual agreement not to proceed, and when that happens the Rules authorize the court to remove the relevant claims, either by formally dismissing them or permitting an amended complaint omitting them. *See* Fed. R. Civ. P. 15(a)(2), 41(a)(2).

2. Section 1292(b) provides another safety valve that enables immediate appeal in fully consolidated cases. That provision states that a district court may certify that "an order not otherwise appealable * * * involves a controlling question of law as to which there is a substantial ground for difference of opinion" and from which "immediate appeal * * * may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). If the district court does so, the court of appeals "may * * * in its discretion[ ] permit an appeal to be taken from such order." *Id.*

This provision thus authorizes appeal from *important* questions of law. *See Swint*, 514 U.S. at 46 (stating that the provision enables review of "orders deemed pivotal and debatable"); *McFarlin* v. *Conseco Servs., LLC*, 381 F.3d 1251, 1255-59 (11th Cir. 2004) (describing legal standard). There is no question that it is available in a fully consolidated case, like any other: The only precondition for invocation of the statute is that the order be "not otherwise ap-

pealable" as an interlocutory order. 28 U.S.C. § 1292(b). And this provision thereby addresses the atypical circumstance in which a judgment on one claim in a consolidated case is sufficiently important that it would be more efficient, rather than less, to send it directly up to appellate review. If both the district court and the court of appeals think a question sufficiently critical that an early appeal is proper, then section 1292(b) provides an avenue for them to grant an appeal.

3. Finally, mandamus review enables courts of appeals to immediately review "clear and indisputable" errors of law for which there is no adequate alternative means of appeal. *Cheney*, 542 U.S. at 380-381. "Th[is] hurdle[ ], however demanding, [is] not insuperable." *Id.* at 381. The Court has repeatedly recognized that mandamus remains a "safety valve for" courts of appeals to "promptly correct[ ] serious errors" in proceedings before final judgment is issued. *Mohawk*, 558 U.S. at 111 (internal quotation marks and alteration omitted). It therefore provides some comfort that in the case of a manifest *error* of law, a litigant is not required to wait until the conclusion of the proceeding as a whole to see it corrected.

B. There Is No Established Or Workable Means Of Making Exceptions To Petitioner's Rule.

Petitioner, in contrast, cannot identify any plausible means of making exceptions to her rule. As petitioner recognizes (at 13-15), her rule cannot be absolute. Requiring parties to take an appeal from *every* judgment entered with respect to a portion of a

consolidated case would be inefficient and unfair. As noted above, immediate appeals from partial judgment will often lead to duplicative proceedings, compel appellate courts to resolve issues intertwined with the merits of remaining claims, and present difficult legal questions that may be obviated by further proceedings. Mandating such appeals also may decouple a claim from the rest of the consolidated case, loosen the district court's control over its docket, and subject opposing parties to duplicative and wasteful litigation. *See supra* Part I.D.

Even petitioner, then, must concede that, "[i]n appeals from *some* consolidated cases, * * * concern[s] about piecemeal appeals [are] valid." Br. 12. But petitioner cannot identify any workable means of separating the many cases in which immediate appeals would be wasteful from the few in which they might be beneficial.

Petitioner's best attempt at such a system is as follows: In her view, litigants must immediately appeal every partial judgment in a fully consolidated case; otherwise, the 30-day appeal clock would run, foreclosing any future appeal. Br. 13. The court of appeals must then "manage" the case by deciding whether to "stay the appeal, pending resolution of the other, non-final, cases that were consolidated with the case on appeal." *Id.* And to make that determination, the court of appeals is to carefully examine the district court record and decide how "distinct" the different issues are, whether the cases "should have been * * * filed as a single case," and what the "prejudice" to the litigant might be from delay. *Id.* at 14 n.11.

This system is deeply flawed. *First*, it places the decision about whether an immediate appeal is appropriate in the hands of the wrong tribunal. Recognizing the "special role" that district courts play "in managing ongoing litigation," *Mohawk*, 558 U.S. at 106 (quoting *Firestone*, 449 U.S. at 374), Congress and this Court have long accorded district judges pride of place in determining when an appeal is appropriate. *See Curtiss-Wright*, 446 U.S. at 8. Indeed, the U.S. Code and the Federal Rules consistently make district courts the gatekeepers to the courts of appeals. *See, e.g.*, Fed. R. Civ. P. 54(b) (authorizing district courts to determine whether "there is no just reason for delay[ing]" entry of a partial final judgment); 28 U.S.C. § 1292(b) (authorizing district courts to determine whether an interlocutory order is suitable for review); *id.* § 1915(a)(3) (authorizing district courts to determine whether an *in forma pauperis* appeal would be "taken in good faith").

Congress and this Court have vested authority with the district courts for a simple reason: District courts are "most likely to be familiar with the case and with any justifiable reasons for delay." *Mackey*, 351 U.S. at 437. Petitioner has offered no reason why the courts of appeals would be better suited to this task than district courts, which "can explore all the facets of a case," *Curtiss-Wright*, 446 U.S. at 12, and—in consolidating cases for all purposes—will have already determined that the cases are closely related. Indeed, it is difficult to imagine how a court of appeals could practicably make the decisions petitioner's rule would require; having no familiarity with the record, it could not easily determine the

relationship between the different claims and the prejudice to the petitioner, at least not without a wholly wasteful outlay of judicial resources.

Second, there is no discernible legal standard governing the court of appeals' determination to stay a case. Courts have "inherent authority to manage their dockets." *Dietz* v. *Bouldin*, 136 S. Ct. 1885, 1892 (2016). As a result, they enjoy "an ample degree of discretion" in managing their calendars, and the factors they may consider are wide-ranging and "equitable in nature." *Kerotest Mfg. Co.* v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-184 (1952). This Court has declined to intrude on that authority even in situations where it has expressed serious "concerns" about delay. *See In re Blodgett*, 502 U.S. 236, 240 (1992) (per curiam) (declining to issue a writ of mandamus to the Ninth Circuit despite its failure to render a decision in a death penalty case for two-and-a-half years).

Accordingly, petitioner's solution would turn a party's appeal rights over to largely unconstrained and unreviewable judicial discretion. That is not the way the system has ever worked: Courts' obligation to hear cases within their jurisdiction is "virtually unflagging." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976). And such a system would substantially dilute the right to appeal that section 1291 guarantees.

By contrast, Rule 54(b) and section 1292(b) provide articulated, reviewable guidance about when an appeal of part of a consolidated case may go forward. *See, e.g.*, *Curtiss-Wright*, 446 U.S. at 8 & n.2. And if a district court errs in the application of those stand-

ards, a litigant can seek abuse-of-discretion review in the court of appeals.

In the end, it is not surprising that petitioner's solution, but not respondents', suffers from these substantial problems. Congress and this Court have developed a detailed scheme for making exceptions to the final judgment rule because their understanding, for decades, has been that a single appeal from final judgment is the norm in multiple-claim cases. *See supra* Part II.A. No one has thought it necessary to devise a scheme that does the reverse—that is, that makes exceptions to a heretofore unknown system of immediate appeals in multiple-claim cases. This Court should not undertake the task of devising such a scheme from scratch, relying on interstitial judicial authority intended for other purposes. The proper rule is what it has long been: A party must wait until final judgment in the case as a whole before lodging an appeal as of right.

III. PETITIONER'S APPEAL IS PREMATURE.

Under the correct rule of law, petitioner appealed too soon.

It is undisputed that the District Court consolidated Elsa's and Samuel's claims "for all purposes." Pet. App. A-4. The court ordered without qualification that the two actions "be consolidated" and instructed that all future submissions be filed on a single docket. Pet. App. A-15. The District Court then conducted all subsequent proceedings jointly: It issued a single trial management order, held a joint trial, and gave the jury a single verdict form for all claims. *See* J.A. 4, 163-172; Pet. App. A-4, A-8.

Nonetheless, Elsa appealed at a time when the District Court had entered final judgment on some, but not all, of the claims in that fully consolidated case. At the time of Elsa's appeal, Elsa had a pending motion for a new trial in the District Court. J.A. 10. And before the Court of Appeals heard her appeal, the District Court had granted that motion and begun holding a new trial—proceedings that have not concluded even today. J.A. 13; Cert. Reply 1. Hence, as the Third Circuit explained, "Samuel's claims against Elsa remain outstanding," and so final judgment has not yet been entered in the case as a whole. Pet. App. A-7.

Consequently, petitioner does not yet have an appeal as of right. Petitioner was entitled to seek *discretionary* appeal pursuant to Rule 54(b)—something that even her own counsel conceded below. Pet. App. A-9 n.11. But for reasons of her own, petitioner declined to do so. Having foregone that opportunity, she must wait until a final judgment is entered terminating all claims in the consolidated case before appealing.

Indeed, this case illustrates the wisdom of delaying appeal until final judgment in the consolidated case as a whole. As the Court of Appeals explained, Elsa's claims substantially overlap with Samuel's: "Witnesses such as Samuel and Elsa would inevitably testify in a suit involving either set of claims, and both sets of claims may turn on" various questions regarding Ethlyn's state of mind and the nature of Samuel's "lease renegotiation." Pet. App. A-8. The Court of Appeals' consideration of the pertinent legal issues will benefit from the District Court's resolu-

tion of the "hotly contested and complex" factual disputes in the case. Pet. App. A-3 n.1. And the District Court's determination of any underlying legal questions common to both claims may simplify the issues on appeal. In these circumstances, as in many others, it is appropriate to require the parties to wait until final judgment so that the pertinent issues, and the consequent expenditure of judicial resources, can be managed in a single combined appeal.

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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ADDENDUM

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STATUTORY PROVISIONS INVOLVED

1. **28 U.S.C. § 1291 provides:**

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

2. **28 U.S.C. § 1292 provides in pertinent part:**

Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except

where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

1. **Federal Rule of Civil Procedure 42 provides:**

Consolidation; Separate Trials

(a) *Consolidation.* If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) *Separate Trials.* For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

2. **Federal Rule of Civil Procedure 54 provides:**

Judgment; Costs

(a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) *Judgment on Multiple Claims or Involving Multiple Parties.* When an action presents more than one

claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) *Demand for Judgment; Relief to Be Granted.* A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) *Costs; Attorney's Fees.*

(1) *Costs Other Than Attorney's Fees.* Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) *Attorney's Fees.*

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law re-

quires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) *Exceptions.* Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.